1-89-CD

RICHARD H. AUSTIN
SECRETARY OF STATE

MICHIGAN
DEPARTMENT
OF STATE
LANSING, MICHIGAN 48918

January 23, 1989

Mr. John F. Markes
Detroit Edison Political Action Committee
2000 Second Avenue
Detroit, Michigan 48226

Dear Mr. Markes:

This is in response to your request for a declaratory ruling concerning the applicability of the Campaign Finance Act (the Act), 1976 PA 388, as amended, to the solicitation of contributions to the Detroit Edison Political Action Committee (EdPAC) from employee-shareholders of the Detroit Edison Company (Detroit Edison).

EdPAC is a separate segregated fund established by Detroit Edison under the authority of section 55 of the Act (MCL 169.255). The solicitation of contributions to EdPAC is restricted to certain individuals by section 55(2). Section 55 states in its entirety:

> "Sec. 55. (1) A corporation or joint stock company formed under the laws of this or another state or foreign country may make an expenditure for the establishment and administration, and solicitation of contributions to a separate segregated fund to be used for political purposes. A fund established under this section shall be limited to making contributions to, and expenditures on behalf of, candidate committees, ballot question committees, political party committees, and independent committees.
>
> (2) Contributions for a fund established by a corporation or joint stock company under this section may be solicited from any of the following persons or their spouses:

(a) Stockholders of the corporation.
(b) Officers and directors of the corporation.
(c) Employees of the corporation who have policy making, managerial, professional, supervisory, or administrative nonclerical responsibilities.

(3) Contributions for a fund established under this section by a corporation which is nonprofit may be solicited from any of the following persons or their spouses:
(a) Members of the corporation who are individuals.
(b) Stockholders of members of the corporation.
(c) Officers or directors of members of the corporation.
(d) Employees of the members of the corporation who have policy making, managerial, professional, supervisory, or administrative nonclerical responsibilities.

(4) Contributions shall not be obtained for a fund established under this section by use of coercion, physical force, or as a condition of employment or membership or by using or threatening to use job discrimination or financial reprisals.

(5) A person who knowingly violates this section is guilty of a felony and shall be punished by a fine of not more than $5,000.00 or imprisoned for not more than 3 years, or both, and if the person is other than an individual, the person shall be fined not more than $10,000.00."

You indicate that EdPAC is considering plans to solicit shareholders who are employees enrolled in the company's Employee Savings Plan (ESP). The ESP is a payroll savings program which allows employees to voluntarily contribute up to six percent of their salary to one or more investment funds. Fund A is a diversified equity fund, Fund B is a government obligations fund, and Fund C consists of investments solely in Detroit Edison Common Stock. ESP contributions funded by salary deductions are fully vested at all times.

In addition, Detroit Edison invests 50 cents in the Detroit Edison Common Stock Fund for every dollar an employee saves. As you explain in your letter:

> "All the Company matching contributions are credited to the participating employees account each calendar year (called "class years"), and may produce earnings. The Company matching contributions and related earnings . . . belong to the employee (are vested) when each class year matures. Each class year matures on January 1 of the fourth calendar year after the year in which the contributions are made. That year in our plan is called a mature year. The Company matching contributions and related earnings represented by that mature year become vested and belong to the employee.
>
> Employee ESP members may withdraw part or all of the value of their Company matching contributions for any mature class years, once a calendar year in an amount of $500 or more in multiples of $100, or 100 percent of the value of their employee contributions, without penalty."

You ask whether employees whose company matching contributions and related earnings are vested are stockholders who may be solicited under the Act.

This question was first presented to the Federal Election Commission on July 25, 1988. Under federal law, a corporation may only solicit contributions to a separate segregated fund from the corporation's stockholders and their families and its executive or administrative personnel and their families. (2 USC 441b(4)(A)(i)). "Stockholder" is defined in 11 CFR 114.1(h) as follows:

> "(h) 'Stockholder' means a person who has a vested beneficial interest in stock, has the power to direct how that stock shall be voted, if it is voting stock, and has the right to receive dividends."

The Commission concluded in Advisory Opinion 1988-36 that ESP participants who have at least one share of Detroit Edison Common Stock credited to their account for a plan year that has matured are stockholders within the meaning of 11 CFR 114.1(h). As such, they may be solicited by EdPAC under federal law. A copy of this Advisory Opinion is attached hereto.

The Michigan act and administrative rules do not include a definition of "stockholder." However, it appears that ESP members who have vested interests in Detroit Edison Common Stock are stockholders within the generally accepted meaning of that term.

According to the documents submitted with your ruling request, ESP participants who have Common Stock credited to their account for a plan

year that has matured shall have a 100% vested interest in that stock (Article IX, section 9.2). The trustee of the fund is required to vote those shares of stock in accordance with the directions of each participant (Article VI, section 6.3(c)). Shares for which no voting instructions are received may not be voted. Finally, participants who have a vested interest share in the profits or losses of Detroit Edison. Under general principles of corporate law, these factors indicate that ESP participants who have Common Stock credited to their account for a mature plan year are stockholders of Detroit Edison.

Presumably, the employees who are the subject of your ruling request do not have policy making, managerial, professional, supervisory, or administrative nonclerical responsibilities and cannot be solicited under section 55(2)(c) of the Act. However, section 55(2)(a) permits the solicitation of stockholders of the corporation. Therefore, in answer to your question, EdPAC may solicit employees who are enrolled in the Employee Savings Plan if their company matching contributions and related earnings in Detroit Edison Common Stock are fully vested.

This response is a declaratory ruling pertaining to the specific facts and questions presented.

Sincerely,

Richard H. Austin

Attachment

[15937] AO 1988-36: Solicitation of ESOP Participants

[Members of an employee savings plan under which matching contributions purchase the employer's stock may be solicited by the corporate political action committee as stockholders since the restrictions on withdrawing stock and on enjoying stock dividends are minimal. Answer to John F. Markea, Detroit Edison Political Action Committee, 2000 Second Avenue, Detroit, Michigan 48226.]

This responds to your letters of July 25 and August 9, 1988, requesting an advisory opinion on behalf of the Detroit Edison Political Action Committee ("EdPAC") concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to the solicitation of voluntary contributions from employees of Detroit Edison Company ("Detroit Edison") who purchase or receive stock through Detroit Edison's Employees' Savings Plan ("ESP") 1/

You explain that after six months of employment, Detroit Edison employees are eligible to participate in the ESP by contributing from one to six percent of their salary on either an after-tax or before-tax basis. 2/ These employees may designate the contributions to three different investment Funds. Funds A and B are invested respectively in common stocks (selected from Standard and Poor's 500 Index) and in certain government obligations or bank deposits. ESP art. VI(a) and (b). Fund C, the Detroit Edison Common Stock Fund, invests solely in Detroit Edison Common Stock. ESP art. VI(c). In addition to ESP contributions funded by salary deductions, Detroit Edison will match 50 cents for every $1 that a participating employee designates to his or her ESP account. ESP art. V, §5.1. These matching employer contributions are deposited in the Detroit Edison Common Stock Fund and invested only in Detroit Edison Common Stock.

You explain that under the ESP, employee vesting and withdrawal rights affecting all types of ESP contributions are based on the "maturing of plan years." 3/ ESP art. IX, §9.1. A plan year matures on January 1 of the fourth calendar year following such plan year. An employee has a 100% vested interest in matching employer contributions made on behalf of that employee during a matured plan year. Therefore, if an employee participant receives a $100 matching contribution in 1983 (plan year one), that contribution vests on January 1, 1987 (plan year four). An employee's interest in any other contribution, however, vests on the date it was made.

You explain that an employee participant may withdraw from the plan once a year, without penalty, all or part of the value of the employee's and the matching employer's contribution with respect to any matured plan year. ESP art. X, §10.3(a). Each time an employee participant makes more than one withdrawal during any plan year, subsequent contributions are suspended for a three month period. ESP art. X, §10.5. An employee who has withdrawn all contributions for matured plan years may withdraw from the plan 100% of the value of employee contributions with respect to all plan years that have not matured. ESP art. X, §10.3(b). If an employee makes such a withdrawal, however, all contributions are suspended for six months. Any employee participant who elects to withdraw his or her interest in the ESP may receive a check for the value of the shares credited to his or her account or receive whole shares of Detroit Edison Common Stock. ESP art. X, §10.8.

As an example of this withdrawal procedure, an employee who earns $20,000 a year, who decides to invest 1% ($200) of that salary in Fund A, will receive .5% ($100) of that salary in matching employer contributions. This $100 is invested in Detroit Edison Common Stock through Fund C, and after one year, that employee will have $100 in Detroit Edison Common Stock attributed to his or her account. Accordingly, on January 1st four years after that plan year ends, that employee may withdraw his or her vested interest in the stock represented by the $100 matching employer contribution four years earlier.

You also indicate that participating employees are given the right to vote all stock allocated to their accounts as exercised through a trustee. ESP art. VI, §6.3(c). Before a meeting of shareholders, the trustee must send participating employees a copy of the solicitation material for such meeting, together with a form that requests that employees provide instructions to the trustee on how to vote the

common stock allocated to the employees' account. Id. Finally, the ESP provides that Detroit Edison will reinvest dividends, interest, and other income of any Fund in that same Fund. Id.

Given these facts, you ask whether employees participating in the ESP would be considered stockholders under 11 CFR 114.1(h) and thus solicitable for voluntary contributions to EdPAC on the basis of that status, even though they are not executive or administrative personnel. 2 U.S.C. §441b(b)(2)(A).

The Act permits a corporation or its separate segregated fund to solicit individual stockholders. 2 U.S.C. §441b(b)(4)(A)(i). Under Commission regulations, a stockholder is defined as a person who (i) has a vested beneficial interest in stock; (ii) has the power to direct how that stock shall be voted; and (iii) has the right to receive dividends. 11 CFR 114.1(h); see also Advisory Opinions 1988-19 [¶5927], 1984-5 [¶5755], 1983-35 [¶5739], and 1983-17 [¶5723].

All employee participants in Fund C and all employee participants with matured matching employer contributions meet the first two requirements of this definition. The ESP provides that employee participants in Fund C, the Detroit Edison Common Stock Fund, are at all times fully vested in contributions credited to their account. ESP art. IX, §9.2. Similarly, those employee participants in Fund A and Fund B will acquire ownership in Detroit Edison Common Stock through matching employer contributions. These contributions will vest when the respective plan years mature which is a maximum of four years after the matching employer contribution is made. Additionally, all participants have an absolute right to vote Detroit Edison stock attributed to their account. ESP art. VI, §6.3(c).

Regarding the right to receive dividends, those employees who actually withdraw Detroit Edison stock credited to their accounts would then satisfy all of the criteria of 11 CFR 114.1(h) and would be considered stockholders under the Act so long as they continue to hold at least one share.[4/] See Advisory Opinions 1988-19 and 1984-5. With respect to the stockholder status of employee participants who have not exercised their withdrawal rights, the Commission concludes that they are also stockholders under 11 CFR 114.1(h) provided they own a vested interest in at least one share and otherwise meet the ESP qualifications to withdraw that share, if desired.

In Advisory Opinion 1984-5 the Pacific Gas and Electric Company ("PGE") offered its employees a savings plan very similar to that offered by Detroit Edison. PGE's plan permitted employees to contribute to three different funds, one of which was an investment fund in PGE common stock. PGE's plan also required PGE to apply 75 cents in matching contributions in PGE stock for every employee contribution made to any of the three funds in the savings plan. All employee participants in the PGE Common Stock Investment Fund and all other participants who received matching employer contributions had at all times a 100% vested interest in any shares attributed to their account. Moreover, all employee participants had full voting rights on those shares. The PGE plan, however, placed "significant restrictions" on many participants' withdrawal rights, automatically suspending subsequent contributions for a specified period or limiting withdrawals to once a year or to a one time only basis. The Commission concluded that where the exercise of withdrawal rights were limited or resulted in an automatic suspension the plan significantly restricted participants' rights to receive dividends. Accordingly, such participants were not stockholders under 11 CFR 114.1(h). The Commission concluded, however, that where participants were able to withdraw at least one share of stock purchased with employer matching contributions without incurring a suspension period, those participants had the right to receive dividends and were stockholders under 11 CFR 114.1(h).

Although Detroit Edison's plan restricts employee participants' ability to withdraw stock, such restrictions do not include automatic suspension or limitation on withdrawals to a once a year or a one time basis. Rather, participants may withdraw employee and matching employer contributions in Detroit Edison stock once a year, after the contribution matures, without automatic suspension of future contributions. ESP art. X, §10.3(a). Moreover, participants are not limited in their withdrawal rights to a once a year or a one time basis. ESP art. X, §§10.4 and

10.5. Accordingly, the Commission concludes that employee participants who have at least one share of Detroit Edison Common Stock credited to their account for a plan year that has matured have the right to receive dividends and thus are stockholders under 11 CFR 114.1(h).

Solicitations by EdPAC and Detroit Edison of voluntary contributions from any employee who qualifies as a Detroit Edison stockholder must meet the requirements for a proper solicitation under the Act and regulations. 2 U.S.C. §441b(b)(3)(A),(B), and (C); see 11 CFR 114.5(a). For example, a corporation or separate segregated fund that solicits contributions of a particular amount must inform the person solicited that such amount is only a suggestion and that the person is free to contribute more or less than the suggested amount. 11 CFR 114.5(a)(2). Moreover, any solicitation for a separate segregated fund must describe the political purposes of the fund and specify that persons have the right to refuse to contribute to the fund without reprisal. 11 CFR 114.5(a)(3),(a)(4), and (a)(5).

This response constitutes an advisory opinion concerning application of the Act or regulations prescribed by the Commission to the specific transaction or activity set forth in your request. See 2 U.S.C. §437f.

Dated: September 26, 1988.

1/ You indicate that there are three Detroit Edison Employees' Savings Plans: (1) Employees' Savings Plan; (2) ESP for employees represented by Local 223 of the Utility Workers Union of America; and (3) ESP for employees represented by Local 17 of the International Brotherhood of Electrical Workers. You explain in a letter dated August 24, 1988, that except for their effective dates the rules and regulations governing each plan are the same. Accordingly, this opinion refers to all three plans as one ESP.

2/ An employee may choose to save before-tax, rather than after-tax, dollars. Such before-tax contributions, called employer elective contributions, are not subject to Federal, State or, local tax until paid out to the employee. ESP art. X, §10.4. After reaching the age of 59 1/2, an employee may withdraw from the plan once a year, without penalty, all or part of the elective employer contributions. ESP art. X, §10.5. Because all employee participants receive matching employer contributions, this opinion does not address the restrictions on the withdrawal of elective employer contributions.

3/ A plan year shall mean the period beginning with the effective date of the plan and ending December 31st of the same year and each calendar year thereafter. ESP art. II, §2.32. The effective dates of all three ESP's are in 1983.

4/ Any employee participants who elect to receive a check for the value of their full interest in Detroit Edison Common Stock will not hold at least one share and would not be stockholders under 11 CFR 114.1(h).

Advisory Opinion 1988-36

CONCURRING OPINION

Commissioner Thomas J. Josefiak

A corporation is generally permitted to solicit contributions to its separate segregated fund from a 'restricted class' composed of stockholders, executive and administrative personnel and their families. 11 CFR 114.5(g)(1). The Commission's regulations define "stockholder" to mean "a person who has a vested beneficial interest in stock, has the power to direct how that stock shall be voted... and has the right to receive dividends." 11 CFR 114.1(h). In the context of employee stock savings plans, employees that are otherwise not solicitable acquire stock through investment accounts subject to special disincentives to withdrawing the accumulated

funds. In those circumstances, the Commission has faced the task of reconciling the broad definition of "stockholder" with the limitations upon access to the investment that are inherent in most employee stock ownership plans.

It may be reasonably argued that 'a stockholder is a stockholder' as long as that person has the essential, legally recognized rights of ownership, voting of shares and right to receive dividends. See the Dissenting Opinion of Commissioner Joan D. Aikens in Advisory Opinion 1983-17 [¶5723]. Most all corporate employee stock ownership plans preserve these fundamental rights at law. It may also be reasonably argued that any qualifications, compromises or limitations upon those essential rights, as are commonly imposed under employee savings plans, place such share owners in a class inferior to normal stockholders and outside the regulation's definition of a "stockholder." See Dissenting Opinion of Commissioner Thomas E. Harris in Advisory Opinion 1983-35 [¶5735]. Unfortunately, evidence can be found within Congressional legislative history to support either argument.

In a series of advisory opinions, the Commission has developed a compromise view of "stockholder" status within the context of employee savings plans by focusing upon that definitional criterion regarding the "right to receive dividends." By that view, employees participating in plans under which they receive their dividends in cash are clearly solicitable as "stockholders." Advisory Opinion 1988-19 [¶5927]. Employees who participate in stock ownership plans under which their dividends are automatically reinvested "qualify as solicitable stockholders only if they actually withdraw stock or have a generally unrestricted option to withdraw stock." FEC Campaign Guide for Corporations and Labor Organizations, p. 10 (relying upon Commission opinions cited below).

In Advisory Opinion 1984-5, the Commission determined that participating employees were not solicitable as "stockholders" under savings plans in which the penalty of "automatic suspension" from further participation in the plan was imposed for withdrawal of funds not held in the account for at least three years. The Commission stated that it viewed "the automatic suspension period as a significant restriction on a participant's right to withdraw stock and therefore on the right to receive dividends." The opinion favorably cited Advisory Opinion 1983-17, where a similar result was reached under circumstances that also included "a one-year suspension period on certain withdrawals." That earlier opinion, however, seemed to endorse a much more sweeping view that employees could not be said to 'receive' dividends under any employee stock ownership plans involving automatic reinvestment of dividends until they actually withdrew stock from the plan. In Advisory Opinion 1984-5, the Commission also distinguished Advisory Opinion 1983-35, which permitted solicitation of employee stockholders where "the savings plan had various disincentives to stock withdrawals, but did not impose any suspension period on the employee's right to make contributions to the plan."

The result reached by the Commission in Advisory Opinion 1988-36 is entirely consistent with this precedent. The present circumstances involve some limitations upon employees' rights to withdraw funds from their stock savings accounts, but the restrictions are not too severe. The opinion seems particularly persuaded by the providing of reasonable opportunities for withdrawals without automatic suspension from the program. This use of a 'significant' restriction test by the Commission appears to be a reasonable compromise position for defining "stockholder" in the setting of employee stock savings plans. It seems to satisfy the Commission's interest in having those solicited stand on a relatively 'equal footing' as stockholders.

Two serious problems with this approach are evident, however. First, legal interpretation under this approach turns on the arcane fine points of provisions in employee stock ownership plans for withdrawal of funds. It fairly demands case-by-case analysis, rather than easily identifiable guidelines. See Harris dissent, id. Distinctions between withdrawal provisions in different plans are certain to become increasingly minute and insignificant.

Second, the underlying argument that unrestricted withdrawal rights are a necessary element to "the right to receive dividends" is based on a fictitious legal notion that the right of receipt depends upon a right to unqualified or immediate

physical possession. Those employees participating in stock ownership plans generally have an absolute legal right to all distributions of corporate profits through dividends to which any other stockholder is entitled. The right to receive dividends is not legally dependent upon an unfettered ability to withdraw shares of stock from the plan -- to physically possess the stock certificates or to "cash out." Limitations upon withdrawing stock which has not been held for a sufficient time period do not deny the employee the right to 'receive' dividends solely because reinvested dividends may routinely be among new additions to the account.

Employees 'own' the stock that represents reinvested dividends, normally a small component of their account, just as much as they 'own' the stock in their account that has been acquired by their own or the corporation's direct contributions. Limitations or penalties upon withdrawal of funds generally apply to the entire account, and no more undermine the right to receive dividends than the right to ownership of the stock generally. Adverse consequences for premature withdrawals are found in IRA's and 401(k) retirement accounts, to which many of these employee stock plans are analogous. Imposition of fees for untimely withdrawal of funds are also common in certain types of mutual funds in which investors own 'stock.' Both the right of ownership of all shares and the right to receive dividends would be considered whole under conventional legal principles, despite the special penalties associated with 'early' withdrawal of stock held under these plans.

The heavy emphasis in the Commission's prior opinions upon the penalty of "suspension" for 'early' withdrawal is especially misplaced. Such a penalty, common in stock ownership plans, undeniably discourages withdrawal of funds. Imposing that penalty does not deprive an employee of any rights to receive dividends from stock already owned, however, but merely suspends the employee's right to acquire more stock pursuant to the corporation's savings plan.

The full value of dividends belongs to employees at the time of the distribution of dividends by the corporation, even if it is reinvested in more shares of stock under the terms of the plan. The full value of all dividends are eventually disbursed pursuant to the terms of the savings plan -- just not as conveniently or as often or as soon as the employee may perhaps wish. Tax laws encourage such employee stock ownership plans precisely because such plans encourage employees to save, not withdraw, their funds. That is the bargain that is struck between the employee, the corporation and the federal government for such forms of employee compensation and savings plans.

Restrictions upon an employees' rights of access to stock held in an account under a corporate stock savings plan may seem to make those employees less of a "stockholder," but not because of any genuine compromise upon the right to receive dividends. The Commission should address the issue of employee stock ownership plans and corporate solicitation of such stockholders directly through regulations, and retire the false and unworkable legal artifice upon which it now relies.

Dated: September 23, 1988.

[The next page is 17,001.]

MICHIGAN DEPARTMENT OF STATE

RICHARD H. AUSTIN • SECRETARY OF STATE

STATE TREASURY BUILDING

LANSING
MICHIGAN 48918

March 31, 1989

Donald W. Freels, CAE
Executive Vice President
Michigan Association of Realtors
P.O. Box 40725
Lansing, Michigan 48901-7925

Dear Mr. Freels:

This is in response to your request for an interpretive statement regarding the requirements of the Campaign Finance Act (the Act), 1976 PA 388, as amended.

The questions you wish the Department to address relate to filing requirements for officers of ballot question committees. Some local associations of realtors intend to form ballot question committees so that they may contribute to future ballot question campaigns. These associations would like to make a staff employee the treasurer of the ballot question committee rather than the association member who serves as the treasurer of the local association.

Specifically, you ask the following questions:

> "1. May an incorporated or non-incorporated membership association which registers as a ballot question committee designate as its treasurer for purposes of the Campaign Finance Act a person other than the individual who serves as the treasurer of the association?"

Section 21 of the Act (MCL 169.221) includes various provisions which relate to the appointment and the duties of the treasurer of a committee. These provisions are set forth in the following subsections of section 21:

"(2) A committee shall have a treasurer who is a qualified elector of this state. A candidate may appoint himself or herself as the candidate committee treasurer."

* * *

"(4) A contribution shall not be accepted and an expenditure shall not be made by a committee which does not have a treasurer. When the office of treasurer in a candidate committee is vacant, the candidate shall be the treasurer until the candidate appoints a new treasurer.

"(5) An expenditure shall not be made by a committee without the authorization of the treasurer or the treasurer's designee. The contributions received or expenditures made by a candidate or an agent of a candidate shall be considered received or made by the candidate committee.

"(6) Contributions received by an individual acting in behalf of a committee shall be reported promptly to the committee's treasurer not later than 5 days before the closing date of any campaign statement required to be filed by the committee, and shall be reported to the committee treasurer immediately if the contribution is received less than 5 days before the closing date.

"(7) A contribution shall be considered received by a committee when it is received by the committee treasurer or a designated agent of the committee treasurer notwithstanding the fact that the contribution is not deposited in the official depository by the reporting deadline."

Section 22 of the Act (MCL 169.222) spells out the record-keeping requirements which a committee treasurer is required to observe.

"Sec. 22. A committee treasurer shall keep detailed accounts, records, bills, and receipts as required to substantiate the information contained in a statement or report filed pursuant to this act or rules promulgated under this act. The treasurer shall record the name and address of a person from whom a contribution is received except for contributions of $20.00 or less received pursuant to section 41(3). The

> records of a committee shall be preserved for 5 years and shall be made available for inspection as authorized by the secretary of state. A person who knowingly violates this section is guilty of a misdemeanor and shall be punished by a fine of not more than $1,000.00 or imprisoned for not more than 90 days, or both."

None of the quoted language imposes a requirement that an organization must name any particular person to be the treasurer of a ballot question committee established by the organization. Likewise there is nothing in the rules promulgated to implement the Act which mandates the appointment of any particular person to the position of treasurer.

You wish to advise your local affiliates that a full-time staff member of the association be selected to be the treasurer of the committee. This is certainly consistent with the Act's provisions and may tend to create more continuity in the performance of the duties specified in the Act.

> "2. Is it necessary for the statement of organization of a ballot question committee to list all of the current officers of the association which establishes it?"

Section 24 of the Act (MCL 169.224) requires that committees shall file a statement of organization within 10 days of their formation. Pursuant to section 3(4) of the Act, a person becomes a committee be receiving contributions or making expenditures which total $200.00 or more in a calendar year. Section 24(2) specifies the items to be included in the statement of organization.

> "(2) The statement of organization required by subsection (1) shall include the following information:
> "(a) The name, street address, and where available the telephone number of the committee. A committee address may be the home address of the candidate or treasurer of the committee.
> "(b) The name, street address, and where available the telephone number of the treasurer and other principal officers of the committee.
> "(c) The name and address of the financial institution in which the official committee depository is or is intended to be located, and the name and address of each financial institution in which a secondary depository is or is intended to be located.
> "(d) The name of each person, other than an individual, that is a member of the committee.
> "(e) The full name of, the office including

district number or jurisdiction sought by, and the county residence of, each candidate, and a brief statement identifying the substance of each ballot question, supported or opposed by the committee. If the ballot question supported or opposed by the committee is not statewide, the committee shall identify the county in which the greatest number of registered voters eligible to vote on the ballot question reside.

"(f) Identification of the committee as a candidate committee, political party committee, independent committee, political committee, or ballot question committee if it is identifiable as such a committee."

Amendments to the statement of organization are required when the information changes. Failure to file an amendment within 10 days of a change subjects the committee to late filing fees of up to $300.00, as well as possible criminal penalties (MCL 169.224).

However, as previously noted the Act does not require that a committee have a particular set of officers. The only officer required by the Act is a treasurer. In the fact situation you have presented the local association could designate an employee to be treasurer of the committee without naming any other officers. The committee would then operate as an adjunct of the local association. If the treasurer were to be changed then an amendment to the statement of organization would be required. But if the local association's officers are not committee officers the statement of organization would not have to be amended every time new officers were selected for the local association.

The foregoing response is informational only and is not a declaratory ruling with respect to the application of the Act to a specific fact situation.

Very truly yours,

Phillip T. Frangos, Director
Office of Hearings and Legislation

PTF:cw:rlp

MICHIGAN DEPARTMENT OF STATE

RICHARD H. AUSTIN • SECRETARY OF STATE

STATE TREASURY BUILDING

LANSING
MICHIGAN 48918

April 25, 1989

Ms. Tammy Pedersen
Committee to Elect John Szczepkowski, Jr.
1800 Tuxedo
Detroit, Michigan 48206

Dear Ms. Pedersen:

This is in response to your letter of March 21, 1989, requesting an exemption from the identification requirements set forth in the Campaign Finance Act (the Act), 1976 PA 388, as amended. As stated in your letter, you intend to have a message favoring Mr. Szczepkowski's candidacy printed on "12" paper rulers."

Section 47(3) of the Act, MCL 169.247, states that "printed matter having reference to an election, . . . shall bear upon it the name and address of the person paying for the matter." This section goes on to state:

> "The size and placement of the disclaimer shall be determined by rules promulgated by the secretary of state. The rules may exempt printed matter and certain other items such as campaign buttons or balloons, the size of which makes it unreasonable to add an identification or disclaimer, from the identification or disclaimer required by this section."

Pursuant to this provision in the Act, the Department has promulgated rule 36(3), 1979 AC R169.36(3):

> "(3) A campaign item, the size of which makes it unreasonable to add an identification or disclaimer, or both, as designated by the secretary of state, is exempted from this rule."

Since the item is printed on paper the identification may be printed on an item of the size you describe.

Based on the above, the Department of State finds that a waiver is inappropriate in the fact situation presented for twelve inch (12") paper rulers.

Very truly yours,

Phillip T. Frangos

Phillip T. Frangos, Director
Office of Hearings and Legislation

PTF:cw:rlp

3-89-CI

MICHIGAN DEPARTMENT OF STATE

RICHARD H. AUSTIN • SECRETARY OF STATE

STATE TREASURY BUILDING

LANSING
MICHIGAN 48918

June 15, 1989

Larry M. Gerschbacher, L.L.S.
Treasurer - Surveyors Political Action Committee of Michigan
220 S. Museum Drive
Lansing, Michigan 48909-1905

Dear Mr. Gerschbacher:

This is in response to your inquiry concerning the applicability of the Campaign Finance Act (the Act), 1976 PA 388, as amended, to the Surveyors Political Action Committee of Michigan (SURPAC). Specifically, you indicate:

> "Our PAC would like to be able to accept corporate funds and use these contributions exclusively to pay for administrative costs such as, but not limited to, postage, stationary, secretarial fees, etc. and keep individual contributions strictly for candidates."

Pursuant to section 54 of the Act (MCL 169.254), a corporation is prohibited from making any contribution or expenditure in candidate elections. Therefore, a corporation may not pay for the administrative costs of an independent or political committee unless the committee is also a separate segregated fund of that corporation.

Separate segregated funds are governed by the requirements of section 55 of the Act (MCL 169.255). This section states:

> "Sec. 55. (1) A corporation or joint stock company formed under the laws of this or another state or foreign country may make an expenditure for the establishment and administration and solicitation of contributions to a separate segregated fund to be used for political purposes. A fund established under this section shall be limited to making contributions to, and expenditures on behalf of, candidate committees, ballot question committees, political party committees, and independent committees.
>
> (2) Contributions for a fund established by a corporation or joint stock company under this section may be solicited from any of the following persons or their spouses:
>
> (a) Stockholders of the corporation.
>
> (b) Officers and directors of the corporation.
>
> (c) Employees of the corporation who have policy making, managerial, professional, supervisory, or administrative nonclerical

responsibilities.

(3) Contributions for a fund established under this section by a corporation which is nonprofit may be solicited from any of the following persons or their spouses:

(a) Members of the corporation who are individuals.

(b) Stockholders of members of the corporation.

(c) Officers or directors of members of the corporation.

(d) Employees of the members of the corporation who have policy making, managerial, professional, supervisory, or administrative nonclerical responsibilities.

(4) Contributions shall not be obtained for a fund established under this section by use of coercion, physical force, or as a condition of employment or membership or by using or threatening to use job discrimination or financial reprisals.

(5) A person who knowingly violates this section is guilty of a felony and shall be punished by a fine of not more than $5,000.00 or imprisoned for not more than 3 years, or both, and if the person is other than an individual, the person shall be fined not more than $10,000.00.

Enclosed is a copy of an Attorney General opinion, OAG, 1977-78, No 5344, p 549 (July 20, 1978), interpreting this section of the Act. In his opinion, the Attorney General indicates that a corporation may pay the administrative costs of a single separate segregated fund established by that corporation. However, a corporation is prohibited from paying the administrative costs of a separate segregated fund established by a different corporation.

Thus, if SURPAC was established by a corporation, only that corporation may pay SURPAC's administrative costs. However, the Act does not allow a corporation to pay the administrative costs of a separate segregated fund established by another corporation or the administrative costs of a committee which is not a separate segregated fund.

This response is informational only and does not constitute a declaratory ruling.

Very truly yours,

Phillip T. Frangos, Director
Office of Hearings and Legislation
(517) 373-8141

PTF/cw

Enc.

When information described in 1956 PA 218, § 2477(2) and (3), as added by 1975 PA 44, *supra*, is transmitted to the Medical Practice Board from the insurance commissioner, it automatically becomes part of a licensee's historical record by virtue of 1973 PA 185, *supra*, § 11b(1) which states:

> "The board shall create and maintain a permanent historical record for each licensee with respect to information and data transmitted pursuant to law."

It is my opinion, therefore, that all of the information provided to the Medical Practice Board by the insurance commissioner pursuant to section 2477 is relevant and becomes part of a licensee's historical record.

FRANK J. KELLEY,
Attorney General.

ELECTIONS: Corporate contributions

Establishment of a "separate segregated fund" by a corporation

CAMPAIGN FINANCE ACT: Establishment of a "separate segregated fund" by a corporation

A "separate segregated fund" established by a corporation pursuant to section 55 of the campaign finance act is a committee that is required to comply with the registration and reporting requirements of the act.

A "separate segregated fund" established by one corporation may not contribute to a "separate segregated fund" established by another corporation.

A corporation may only establish one "separate segregated fund".

Opinion No. 5344 July 20, 1978.

Honorable Richard H. Austin
Secretary of State
Treasury Building
Lansing, Michigan 48918

You have asked several questions concerning the Campaign Finance Act, 1976 PA 388, as amended by 1977 PA 314, MCLA 169.201 *et seq*; MSA 4.1703(1) *et seq* (hereinafter referred to as "the Act"). Your letter of request indicated that several "separate segregated funds" established by corporations have registered with the Department of State pursuant to provisions of the Act and that they have registered either as an independent committee, which is defined in section 8(2), or as a political committee, which is defined in section 11(2). Your questions are:

1. Is it necessary for a "separate segregated fund" to register with the Department of State?
2. May a "separate segregated fund" established by one corporation contribute to a "separate segregated fund" established by a second corporation?

3. May a corporation establish more than one "separate segregated fund"?

These questions will be addressed seriatim.

1. Is it necessary for a "separate segregated fund" to register with the Department of State?

Section 55 of the Act states:

"(1) A corporation or joint stock company formed under the laws of this or another state or foreign country may make an expenditure for the establishment and administration and solicitation of contributions to a separate segregated fund to be used for political purposes. A fund established under this section shall be limited to making contributions to, and expenditures on behalf of, candidate committees, ballot question committees, political party committees, and independent committees.

"(2) Contributions for a fund established by a corporation or joint stock company under this section may be solicited from any of the following persons or their spouses:

"(a) Stockholders of the corporation.

"(b) Officers and directors of the corporation.

"(c) Employees of the corporation who have policy making, managerial, professional, supervisory, or administrative nonclerical responsibilities.

"(3) Contributions for a fund established under this section by a corporation which is nonprofit may be solicited from any of the following persons or their spouses:

"(a) Members of the corporation who are individuals.

"(b) Stockholders of members of the corporation.

"(c) Officers or directors of members of the corporation.

"(d) Employees of the members of the corporation who have policy making, managerial, professional, supervisory, or administrative nonclerical responsibilities.

"(4) Contributions shall not be obtained for a fund established under this section by use of coercion, physical force, or as a condition of employment or membership or by using or threatening to use job discrimination or financial reprisals.

"(5) A person who knowingly violates this section is guilty of a felony and shall be punished by a fine of not more than $5,000.00 or imprisoned for not more than 3 years, or both, and if the person is other than an individual, the person shall not be fined more than $10,000.00."

To appreciate fully the significance of section 55 of the Act, it is helpful to note that a corrupt practices act was first enacted as 1913 PA 109, and section 14 therefore provided:

"No officer, director, stockholder, attorney, agent or any other person, acting for any corporation or joint stock company, whether incorporated under the laws of this or any other state or any foreign country, except corporations formed for political purposes, shall pay, give or lend, or authorize to be paid, given or lent any money belonging to such corporation to any candidate or to any political committee for the payment of any election expenses whatever."

This language was re-enacted in 1915[1], 1925[2], 1929[3], 1948[4] and, finally, by enactment of 1954 PA 116, became section 919 of the Elections Code[5]. By enactment of 1975 PA 227, the limitations on corporate involvement were relaxed by permitting the use of corporate funds for the "establishment and administration of a separate segregated corporate political education fund to be utilized for the sole purpose of making contributions to and expenditures on behalf of candidate committees." 1975 PA 227, § 95(2). Although 1975 PA 227 was declared unconstitutional for other reasons by the Michigan Supreme Court[6], 1976 PA 388, *supra*, § 55 re-enacted the above-quoted language of 1975 PA 227, *supra*.

OAG, 1977-1978, No 5279, p ___ (March 22, 1978), held that a corporation may not use monies from its corporate treasury to make contributions to a committee which in turn supports state candidates, but that the corporation may make expenditures for establishment and administration of a fund to be used for political purposes, and that the contributions to the fund may only come from persons identified in section 55 of the Act, i.e., (1) stockholders of the corporation, (2) officers and directors of the corporation, and (3) employees of the corporation with policymaking, managerial, professional, supervisory or administrative nonclerical responsibilities.

Section 3(4) of the Act defines "committee" as:

> ". . . a person who receives contributions or makes expenditures for the purpose of influencing or attempting to influence the action of the voters for or against the nomination or election of a candidate, or the qualification, passage, or defeat of a ballot question, if contributions received total $200.00 or more in a calendar year or expenditures made total $200.00 or more in a calendar year. An individual, other than a candidate, shall not constitute a committee."

Section 11(1) defines "person" as:

> ". . . a business, individual, proprietorship, firm, partnership, joint venture, syndicate, business trust, labor organization, company, corporation, association, committee, or any other organization or group of persons acting jointly."

As amended by 1977 PA 314, MCLA 169.211; MSA 4.1703(1), the Act now identifies five, rather than four, types of committees. Section 2(2) defines a ballot question committee, section 3(2) defines a candidate committee, section 8(2) defines an independent committee, and section 11(5) defines a political party committee. 1977 PA 314, *supra*, amended the Act to include a definition for "political committee" in section 11(2), which states:

> " 'Political committee' means a committee which is not a candidate committee, political party committee, independent committee, or ballot question committee."

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[1] CL 1915, § 3846.
[2] 1925 PA 351, Pt 5, c II, § 19.
[3] CL 1929, § 3324.
[4] CL 1948, §§ 189.19 & 196.19.
[5] MCLA 168.919; MSA 6.1919.
[6] *Request for Advisory Opinion on Constitutionality of 1975 PA 227*, 396 Mich 123; 240 NW2d 193 (1976).

Corporate involvement in the financing of elections is limited to activity authorized by sections 54 and 55 of the Act. Section 54 indicates the means by which a corporation may form a ballot question committee[7]. A "separate segregated fund" is precluded from qualifying as a candidate committee or political party committee by their definitions. However, a "separate segregated fund" may qualify and, in fact, must register as either a political committee or an independent committee, provided it meets the appropriate definition. Since the "separate segregated fund," once it exceeds $200.00 in contributions or expenditures, is a committee, it is my opinion that it must register with the Department of State either as a political committee or as an independent committee, as defined in the statute.

A "separate segregated fund" functions as the result of joint action by an organization; consequently, it is a "person" as defined in the statute. If a "separate segregated fund" receives $200.00 or more in a calendar year, it is a "committee" for purposes of the Act. As such, it is subject to the registration and reporting requirements set forth in the statute.

2. May a "separate segregated fund" established by one corporation contribute to a "separate segregated fund" established by a second corporation?

As noted above, a "separate segregated fund" is restricted to contributions from the following sources: (1) shareholders of the corporations, (2) officers and directors of the corporation and (3) employees of the corporation with policymaking, managerial, professional, supervisory or administrative nonclerical responsibilities. No other person, except spouses of the foregoing individuals, may contribute to the "separate segregated fund".

Section 55 of the Act further indicates that the "separate segregated fund" is limited to making contributions to or expenditures on behalf of candidate committees, ballot question committees, political party committees and independent committees. Thus, a "separate segregated fund" established by a corporation, even though registered as a political committee, may not make contributions to another corporation's "separate segregated fund", because it may only make contributions to "candidate committees, ballot question committees, political party committees and independent committees". Section 55.

3. May a corporation establish more than one "separate segregated fund"?

Section 55 of the Act states that a corporation may make an expenditure for the establishment and administration and solicitation of contributions to *a* "separate segregated fund" to be used for political purposes. The use of the singular followed by language which strictly restricts contributions for *a* fund leads to the conclusion that the legislature intended that only one separate segregated fund may be created by a corporation. This conclusion is consistent with the legislative history of corporate involvement in elections noted above.

As noted in OAG, No 5279, *supra*, administration of the separate segregated fund and the authorization of expenditures from the fund must be by the board of

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[7] It will be noted that, in addition, the United States Supreme Court held in *First National Bank of Boston* v *Bellotti*, __US __; 98 S Ct 1407 (1978), that the First Amendment protects the right of a corporation to expend its funds to influence a vote on a referendum proposal.

directors of the corporation or by a committee authorized by the board of directors of the corporation.

The limitation of one "separate segregated fund" for each corporation is consistent with other provisions of the Act. For example, a candidate may only have one candidate committee. Section 21(3) provides that all monies in the candidate committee must pass through one official depository of the committee. All contributions to the committee and expenditures by the committee must be made from the committee's official depository.

Section 11(5), in defining "political party committee", limits each state central, district or county party to a single committee. Section 8(2), in defining "independent committee", indicates that a separate level, subsidiary, subunit or affiliate of an organization which is an independent committee may create an independent committee only if the decisions or judgments for the subsidiary committee to make contributions or expenditures on behalf of candidates are independently exercised within the separate level, subsidiary, subunit or affiliate of the parent organization.

Thus, a corporation may make an expenditure for the establishment, administration and solicitation of contributions to only one "separate segregated fund."

FRANK J. KELLEY,
Attorney General.

OFFICERS AND EMPLOYEES: Reduction of salary during term of office

PROSECUTING ATTORNEY: Reduction of salary during term of office

WORDS AND PHRASES: "Salary"

"Compensation"

Payment by county board of commissioners of dues to the State Bar Association or other professional organization on behalf of the county prosecutor is a fringe benefit of employment and may be terminated by the board at any time.

Opinion No. 5334 July 21, 1978.

The Honorable Jack Welborn
State Senator
The Capitol
Lansing, Michigan 48909

You have requested my opinion as to whether a county board of commissioners may discontinue payment by the county of state bar dues and membership fees in professional organizations on behalf of a county prosecuting attorney during his current term of office, where the same have been regularly paid since the inception of his term of office.

1879 PA 154, § 1, as amended by 1967 PA 163; MCLA 45.421; MSA 5.1101, provides:

> "The annual *salaries* of all salaried county officers, which are now or may be hereafter by law fixed by the board of supervisors, shall be fixed by the

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STATE OF MICHIGAN

FRANK J. KELLEY, ATTORNEY GENERAL

Opinion No. 6591

June 29, 1989

ELECTIONS:

Expenses attendant to recall of officeholder

OFFICEHOLDER'S EXPENSE FUND:

Payment of expenses relating to recall of the officeholder

Moneys in an officeholder's expense fund may not be used to pay legal and other expenses incurred in connection with the circulation and filing of recall petitions, the clarity hearing relating to the recall petition, or the recall election of the officeholder.

Honorable Richard H. Austin

Secretary of State

Michigan Department of State

Lansing, Michigan 48918

You have requested my opinion on several questions regarding the use of an officeholder's expense fund (OEF) under the campaign finance act, MCL 169.201 et seq; MSA 4.1703(1) et seq, during a possible recall election of that officeholder.

The campaign finance act authorizes an elected public official to establish an OEF to pay "expenses incidental to the person's office." MCL 169.249(1); MSA 4.1703(49)(1). The campaign finance act prohibits, however, an OEF from making "contributions and expenditures to further the nomination or election of that public official." Id.

Section 205 of the campaign finance act states that the term: " '[e]lection' includes a recall vote." MCL 169.205; MSA 4.1703(5). The term "recall vote" is not further defined. A "candidate" is defined as "an officeholder who is the subject of a recall vote." MCL 169.203(1)(d); MSA 4.1703(3)(1)(d).

Your first question is whether an OEF may be used to pay legal and other expenses incurred in connection with the officeholder's recall after the recall petitions are determined sufficient. MCL 169.205; MSA 4.1703(5), expressly includes a recall election as an "election" under the campaign finance act, and makes an officeholder who is the subject of a recall vote a "candidate." Equally plain, MCL 169.249(1); MSA 4.1703(49)(1), prohibits an officeholder from using the office-holder's OEF to make contributions or expenditures to further his or her election. The plain language of the campaign finance act, therefore, prohibits the officeholder who is the subject of a recall from using his or her OEF in

opposition to the recall. It should be applied as written. See Collins v Waterford Twp School Dist, 118 Mich App 798, 804; 325 NW2d 585 (1982).

The Secretary of State in a January 3, 1984 declaratory ruling to L. Brooks Patterson ruled similarly on a different issue: "It is clear that a recall vote is an election pursuant to the Act. As a result, committees which participate in recall elections are required to meet all the registration and disclosure requirements of the Act."

It is my opinion, in answer to your first question, that the officeholder's expense fund of an officeholder who is the subject of a recall may not be used to pay legal and other expenses incurred in connection with the officeholder's recall after the recall petitions are determined sufficient.

Your second question is whether an OEF may be used to pay legal and other expenses in connection with the circulation and filing of the recall petitions. The campaign finance act does not define "recall vote" and therefore provides no clear answer to the question. On the one hand, the campaign finance act's definition of a recall vote as an election supports the argument that an OEF may not be used. On the other, no election or vote can occur until the recall petitions are determined sufficient. The definition of "candidate" also leaves the issue unresolved because an officeholder incurring expenses in opposing the circulation and filing of recall petitions may or may not be "the subject of a recall vote." It depends on whether the recall petitions are determined sufficient.

The legislative purpose of a statute may be examined to ascertain the meaning of a statute where its language is ambiguous. People v Gilbert, 414 Mich 191, 199-200; 324 NW2d 834 (1982), Crawford v School Dist No 6, 342 Mich 564, 568; 70 NW2d 789 (1955). The disclosure and recordkeeping requirements of the campaign finance act are remedial in nature and seek to inform the public as to the source of campaign money, to deter actual corruption and avoid the appearance of corruption, and to provide data to be used in the detection of violations of contribution limitations. See Advisory Opinion on Constitutionality of 1975 PA 227 (Questions 2-10), 396 Mich 465, 489; 242 NW2d 3 (1976). The Legislature was concerned that there was "a crisis of confidence in elected officials among voters today, and the growing influence of 'big money' in increasingly expensive campaigns." House Legislative Analysis, SB 1570, December 17, 1976. Remedial statutes are liberally construed to effectuate their purposes. Oakland County Treasurer v Auditor General, 292 Mich 58, 64; 290 NW 327 (1940).

Corruption and the appearance of corruption may occur as easily during the gathering of signatures on a recall petition as after those signatures are gathered. As the Attorney General concluded with respect to corporate contributions for a recount:

> "There are costs involved in holding a recount just as there are costs involved in seeking office. These costs may deter a person from seeking office, limit a candidate's campaign or influence a candidate who has apparently lost an election by a close margin from seeking a recount unless the candidate in all three instances receives financial assistance. Thus, a financial contribution to pay for a recount may affect the outcome of an election as much as expenditures made to finance the election campaign." OAG, 1977-1978, No 5422, p 761, 762 (December 29, 1978).

The process of gathering signatures on a recall petition and determining the sufficiency of those signatures is part of the process leading to the recall election. It is, as with recounts, often adversarial. See id at 762. The officeholder whose recall is sought has the right to challenge the validity of a signature or the registration of an elector signer on the recall petition. MCL 168.961a; MSA 4.1703(61a).

In the analogous situation of an officeholder opposing a nominating petition of a possible opponent, funds received and spent would be campaign contributions and donations of the candidate officeholder. See MCL 169.204 and 169.209; MSA 4.1703(4), and MSA 4.1703(9). The officeholder would be a candidate. MCL 169.203(1)(c); MSA 4.1703(3)(1)(c). MCL 169.249; MSA 4.1703(49), expressly prohibits the use of an OEF "to make contributions and expenditures to further the nomination ... of that public official." (Emphasis added.)

In a letter to Mr. Richard D. McLellan dated February 13, 1984, the Department of State addressed the use of an OEF with regard to a "proposed recall" and gave an administrative construction. The Department stated that "use of OEF money would be improper because the OEF may not be used in an election in which the officeholder is involved."

In light of the broad remedial purposes of the Act, it is my opinion, in answer to your second question, that the officeholder's expense fund of an officeholder who is the subject of recall petitions being circulated and filed may not be used to pay legal and other expenses in connection with the circulation and filing of recall petitions.

Your third question is whether an OEF may be used to pay legal and other expenses in connection with the clarity hearing on the proposed recall petitions under MCL 168.952; MSA 6.1952. A clarity hearing is held to "determine whether the reasons for recall stated in the petition are or are not of sufficient clarity to enable the officer whose recall is sought and the electors to identify the course of conduct which is the basis for the recall." MCL 169.952(3); MSA 4.1703(52)(3). The analysis of whether an OEF may be used to pay legal and other expenses in connection with a clarity hearing is similar to the analysis in the previous question. The analysis is complicated, however, by the fact that there was no requirement for a clarity hearing when the campaign finance act was passed.

Legislative intent will control whether an OEF may be used for expenses incurred in connection with a clarity hearing. As previously discussed, the campaign finance act is a broad remedial statute.

The clarity hearing is an integral part of the process. It may affect whether a recall election will be held and the outcome of the election if it is held. As noted in House Legislative Analysis, HB 5381, February 18, 1982:

> "Veterans of recall campaigns claim that the reasons found on recall petitions justifying removing someone from office are often vague, frivolous, unsubstantiated, or plainly false. To aggravate matters, it is not uncommon for officials to be unable to discover the reasons stated on petitions being circulated in their community calling for their removal from office until the petitions are filed with the local clerk. By that time, the petitions are likely to bear the number of signatures necessary for a recall election to be ordered. This is particularly galling since, practically speaking, obtaining the required number of signatures is all that is necessary to produce a recall election. ... This means that to prevent a recall election from being held, an elected official must convince the citizenry not to sign the petitions being circulated, and this task is unnecessarily difficult when the official does not know what allegations the petitioners are making and is made more difficult in those cases where sponsors of recall petitions are misrepresenting the allegations or the nature of the petition. (This assumes that most people do not read the petitions they sign but take the petitioners' word for its contents)." (Emphasis added.)

HB 5381 was enacted as 1982 PA 456 to amend MCL 168.952; MSA 4.1703(52).

The clarity hearing may be an adversarial process. MCL 168.952(5); MSA 4.1703(52)(5) states: "Upon being notified of the reason or reasons for recall by the board of county election commissioners, the officer whose recall is sought and the sponsors of the petition may appear at the meeting and present arguments on the clarity of the reasons or reasons."

Expenses incurred at a clarity hearing are very similar to expenses incurred at a recount. See OAG, 1977-1978, No 5422, supra, at 761-762, where the Attorney General concluded that corporations cannot contribute funds to defray these expenses because they are a political "contribution" prohibited under the campaign finance act.

It is my opinion, in answer to your third question, that the officeholder's expense fund of an officeholder who is the subject of proposed recall petitions at a clarity hearing may not be used to pay legal and other expenses in connection with the clarity hearing.

Frank J. Kelley

Attorney General

MICHIGAN DEPARTMENT OF STATE

RICHARD H. AUSTIN • SECRETARY OF STATE

STATE TREASURY BUILDING

LANSING
MICHIGAN 48918

4-89-CI

August 24, 1989

Thelma Castillo
4958 Heather Drive
Building 6-109
Dearborn, Michigan 48126

Dear Ms. Castillo:

This is in response to your request for an interpretive statement regarding the applicability of the Campaign Finance Act (the Act), 1976 PA 388, as amended, to the solicitation of attorneys by a separate segregated fund. Specifically, you state:

> "A hypothetical profitable law firm corporation has established a separate segregated fund to be used for political purposes. The law firm understands that [Michigan's law] allows officers, directors and employees whom (sic) have policy making, managerial, supervisory or administrative responsibilities to contribute to the fund. However, the law firm requests an interpretive statement regarding the meaning of 'professional responsibilities.' Does the word 'professional' allow all the attorneys in the law firm to contribute to this separate segregated fund or does it only allow the partners to contribute to this separate segregated fund?"

Pursuant to rule 6 of the administrative rules promulgated to implement the Act, 1979 AC R169.201, et seq, the Secretary of State may issue a declaratory ruling as to the applicability of the Act to an actual state of facts. If the facts, though actual, are lacking in specificity the Department will issue an interpretive statement in lieu of a ruling. The Department is unable to issue a specific response to a hypothetical question. However, the following general discussion is offered for your benefit.

The solicitation of contributions to the separate segregated fund of a profit corporation is governed by section 55(2) of the Act (MCL 169.255). This section provides:

> "Sec. 55. (2) Contributions for a fund established by a corporation or joint stock company under this section may be solicited from any of the following persons or their spouses:
>
> "(a) Stockholders of the corporation.
>
> "(b) Officers and directors of the corporation.
>
> "(c) Employees of the corporation who have policy making, managerial, professional, supervisory, or administrative nonclerical responsibilities."

You ask whether attorneys who are not partners in the hypothetical law firm are employees of the corporation having "professional responsibilities" who may be solicited pursuant to section 55(2)(c).

The term "professional responsibilities" is not defined anywhere in the Act. However, it appears this provision includes the responsibilities of persons who are licensed members of the legal profession. Therefore, an attorney employed by an incorporated law firm to engage in the practice of law is an employee who has professional responsibilities within the meaning of section 55(2)(c). As such, the attorney may be solicited for contributions to the corporation's separate segregated fund.

If construed in this manner, the Michigan Act is consistent with regulations promulgated to implement the Federal Election Campaign Act. Under federal law, a separate segregated fund established by a corporation is prohibited from soliciting contributions from any person other than its stockholders and their families and its executive or administrative personnel and their families. "Executive or administrative personnel" is defined in 11 CFR § 114.1(c), which states in pertinent part:

> "(c) 'Executive or administrative personnel' means individuals employed by a corporation or labor organization who are paid on a salary rather than hourly basis and who have policymaking, managerial, professional, or supervisory responsibilities.
>
> "(1) This definition includes:
>
> "(i) the individuals who run the corporation's business such as officers, other executives, and plant, division and section managers; and

"(ii) individuals following the recognized professions, such as lawyers and engineers."

This response is informational only and does not constitute a declaratory ruling. It should also be noted that your request for an interpretive statement was received prior to the enactment of 1989 PA 95 and was therefore not subject to the notice and written comment provisions of the amendatory act.

Very truly yours,

Phillip T. Frangos

Phillip T. Frangos, Director
Office of Hearings and Legislation
517/373-8141

PTF:rlp

MICHIGAN DEPARTMENT OF STATE

RICHARD H. AUSTIN • SECRETARY OF STATE

STATE TREASURY BUILDING

5-89-CI

LANSING

MICHIGAN 48918

August 24, 1989

Thelma Castillo
4958 Heather Drive
Building 6-109
Dearborn, Michigan 48126

Dear Ms. Castillo:

This is in response to your request for an interpretive statement under the Campaign Finance Act (the Act), 1976 PA 388, as amended. Specifically, you ask whether a hypothetical corporation's separate segregated fund may collect contributions by a reverse check-off if refunds of an employee's contributions are limited to the prior two payroll deductions.

Pursuant to rule 6 of the administrative rules promulgated to implement the Act, 1979 AC R169.201, et seq, the Secretary of State may issue a declaratory ruling as to the applicability of the Act to an actual state of facts. If the facts, though actual, are lacking in specificity the Department will issue an interpretive statement in lieu of a ruling. The Department is unable to issue a specific response to a hypothetical question. However, the following general discussion is offered for your benefit.

Under a reverse check-off, contributions to a separate segregated fund are automatically deducted from eligible employees' paychecks unless an employee indicates beforehand that he or she does not wish to participate in the system. In the enclosed letters to Peter F. McNenly, dated August 4, 1987, and to Thomas H. Shields, dated November 16, 1987, the Secretary of State ruled that reverse check-offs proposed by the Michigan Education Association and the Marketing Resource Group, Inc., did not violate the Act. These rulings relied, in part, upon the Sixth Circuit Court of Appeal's decision in Kentucky Educators Public Affairs Council v Kentucky Registry of Election Finance, 677 F2d 1125 (CA 6, 1982). There, the Court specifically approved a reverse check-off procedure permitting an employee to opt out of the contribution system before any amount was deducted from his or her paycheck and request and receive refunds of prior contributions.

As the cases cited by the Court of Appeals and discussed at length in the McNenly letter indicate, only reverse check-off plans which provide refunds of prior contributions have withstood legal scrutiny. The right to a refund insures that an employee knowingly and voluntarily contributes to the fund for the express purpose of participating in shared political activity. An employee who does not initially comprehend the political purpose of the payroll deduction or who misses the deadline for checking off may therefore disassociate himself or herself from the separate segregated fund's activities by obtaining a refund. Similarly, if an employee is offended by the fund's political views, the employee can withdraw support by recovering contributions previously deducted from his or her paycheck. A reverse check-off plan which limits the refund of contributions to the two previous payroll deductions may not adequately protect employees from engaging in unwanted political activity.

An employer contemplating the implementation of a reverse check-off should also be aware of the restrictions found in the Wages and Fringe Benefits Act, 1978 PA 390, as amended. As pointed out in the letter to Thomas H. Shields, § 7 of the Act prohibits an employer from deducting "from the wages of an employee, directly or indirectly, any amount without the full, free, and written consent of the employee, obtained without intimidation or fear of discharge for refusal to permit the deduction."

This response is informational only and does not constitute a declaratory ruling. It should also be noted that your request for an interpretive statement was received prior to the enactment of 1989 PA 95 and was therefore not subject to the notice and written comment provisions of the amendatory act.

Very truly yours,

Phillip T. Frangos, Director
Office of Hearings and Legislation
517/373-8141

PTF:rlp
enclosures

2-87-CD

RICHARD H. AUSTIN
SECRETARY OF STATE

MICHIGAN
DEPARTMENT
OF STATE
LANSING, MICHIGAN 48918

August 4, 1987

Mr. Peter F. McNenly
Levin, Levin, Garvett and Dill
3000 Town Center, Suite 1800
Southfield, Michigan 48075

Dear Mr. McNenly:

This is in response to your request for a declaratory ruling concerning the applicability of the Campaign Finance Act (the Act), 1976 PA 388, as amended, to a reverse check-off procedure for collecting contributions, as proposed by the Michigan Education Association (MEA) and the Michigan Education Association Political Action Council (MEA-PAC).

You indicate the "MEA is a voluntary membership organization composed of approximately 100,000 individuals, both professional and nonprofessional, employed by Michigan education institutions." Membership is not required in order to secure or maintain employment in an institution. However, all MEA members must join both an affiliated local association and MEA's parent organization, the National Education Association (NEA).

In most cases, the local association is the exclusive representative of MEA members for purposes of collective bargaining under the Public Employment Relations Act (PERA), 1947 PA 336, as amended. Pursuant to section 10(1) of PERA (MCL 423.210):

> "Local associations are permitted . . . to negotiate what are commonly called 'agency shop clauses' in their collective bargaining agreements. Under an agency shop clause an individual is not required to be a member of the MEA or its local affiliate in order to work, but the local association and public employer agree 'to require as a condition of employment that all employees in the bargaining unit pay to the exclusive bargaining representative a service fee equivalent to the amount of dues uniformly required of members . . . .' The rights of nonmember agency fee payers are controlled by MEA Administrative Policy V which provides that they shall receive all 'appropriate services' but shall not be permitted to participate in policy making, voting, or holding of office within MEA or its affiliates. Perhaps most important, for present purposes, agency fee payers are not solicited for contributions to MEA's separate segregated fund MEA-PAC, discussed infra, and no part of the service or agency fee goes to support MEA-PAC activities. Further, under the proposal discussed infra, the MEA-PAC contribution will not be part of the service or agency fee."

MEA-PAC is a separate segregated fund established by MEA, a non-profit corporation, pursuant to section 55 of the Act (MCL 169.255). This section states, in relevant part:

> "Sec. 55. (1) A corporation or joint stock company formed under the laws of this or another state or foreign country may make an expenditure for the establishment and administration and solicitation of contributions to a separate segregated fund to be used for political purposes. A fund established under this section shall be limited to making contributions to, and expenditures on behalf of, candidate committees, ballot question committees, political party committees, and independent committees.
>
> * * * * *
>
> (3) Contributions for a fund established under this section by a corporation which is nonprofit may be solicited from any of the following persons or their spouses:
> (a) Members of the corporation who are individuals.
> (b) Stockholders of members of the corporation.
> (c) Officers or directors of members of the corporation.
> (d) Employees of the members of the corporation who have policy making, managerial, professional, supervisory, or administrative nonclerical responsibilities."

You indicate that presently, most contributions to MEA-PAC are collected from MEA members through a voluntary payroll deduction plan. Upon joining MEA, an individual may execute a MEA-PAC Voluntary Contribution Authorization form, which is printed separately and as part of the MEA Continuing Membership Application. The authorized amount is then deducted from the member's paycheck and remitted by the local association to MEA, along with the member's dues. Upon receipt, the MEA-PAC contribution is transferred directly to MEA-PAC. A member may prevent MEA-PAC contributions by revoking his or her payroll deduction authorization in writing prior to September 1 of the next membership year (September 1 through August 31).

MEA and MEA-PAC propose to modify the current collection procedure by implementing a Guaranteed Contribution System. Under this proposal, a $10.00 contribution will automatically be deducted from each member's salary and remitted to MEA-PAC unless the member indicates that he or she does not wish to make a contribution, or the member requests a refund. The system will be funded by increasing MEA dues by $1.00 per month for each of the 10 months (September through June) in which dues are collected. Agency fee payers will not be subjected to a corresponding increase.

Any new member will be required to execute a Continuing Membership Dues Authorization form. A notice will appear on the form indicating that 1) a contribution to MEA-PAC is included in the member's MEA dues; 2) the contribution will be made on the member's behalf unless the member indicates on the front of the form that he or she does not elect to make a contribution, or unless the member requests a refund; 3) a full refund will be made if the member submits a written refund request by December 1 of the current fiscal year; 4) a request for refund will automatically operate to discontinue contributions in future years; 5) the contribution will be used to help support candidates for elective office; 6) the contribution is voluntary and not a condition of membership or employment; 7) a member has the right to refuse to contribute; and 8) such refusal will in no way alter the person's membership or employment status, rights or benefits.

A new member may refuse to participate in the system by indicating or "checking off" on the form that he or she does not elect to make a MEA-PAC contribution. Under the revised system described in your third ruling request, if a member checks-off, the additional dollar will not be deducted from the member's paycheck.

Existing MEA members "will be advised of the new procedure by way of a notice which will appear in each issue of the MEA VOICE during the first year the proposed system is implemented and in the September issues of each year thereafter." A copy of the VOICE, which is published 15 times per year, is sent to each member's home. The proposed notice will contain information substantially similar to the information provided to new members. In addition, a form will be provided to every member who does not contribute to MEA-PAC under the current payroll deduction plan. The member may refuse to participate in the Guaranteed Contribution System by checking off and returning the form to his or her local treasurer or to MEA. If a member checks-off before the start of the next fiscal year, a contribution will not be deducted from the member's paycheck.

A member who does not check-off, or a member who elects to make a contribution, will have $1.00 per month transferred to MEA-PAC on his or her behalf unless a request for refund is made by December 1 of the current membership year. Under your revised proposal, MEA-PAC will refund $10.00 to any member who submits a timely refund request. If the member has contributed less than $10.00 when the refund is made, an additional dollar will continue to be deducted from the member's paycheck during that fiscal year and will be used to reimburse MEA-PAC. However, no deduction will be made in subsequent fiscal years.

MEA requests a ruling that the proposed Guaranteed Contribution System, as described above, does not violate the Act.

Section 54 of the Act (MCL 169.254) prohibits a corporation from making contributions or expenditures in candidate elections. However, as noted previously, section 55 authorizes a corporation to make expenditures for the establishment, administration and solicitation of contributions to a separate segregated fund. The fund may be used to make contributions to, and expenditures on behalf of, candidate committees, ballot question committees, political party committees and independent committees.

Contributions to a separate segregated fund established by a nonprofit corporation are restricted by section 55(3) and (4). Pursuant to subsection (3), contributions may only be solicited from a limited number of persons, including individual members of the corporation. The method used to collect contributions is restricted by subsection (4), which states:

> "Sec. 55. (4) Contributions shall not be obtained for a fund established under this section by use of coercion, physical force, or as a condition of employment or membership or by using or threatening to use job discrimination or financial reprisals."

The Attorney General has indicated that the Act "does permit a voluntary payroll deduction plan as a form of collection of contributions to [a] separate segregated fund." OAG, 1977-78, No 5279, p 391 (March 22, 1978). The issue raised by your inquiry is whether contributions collected under the reverse check-off procedure are voluntary, or whether they are obtained by coercion, force, threat, or as a condition of employment or membership.

The federal courts have previously considered the propriety of using labor union funds to finance political activity. In Abood v Detroit Board of Education, 431 US 209; 97 S Ct 1782; 52 L Ed 2d 261 (1977), the Supreme Court considered the validity of an agency shop clause negotiated by the Detroit Federation of Teachers and the Detroit Board of Education pursuant to the Michigan Public Employment Relations Act, supra. The agency shop provision required non-members to pay to the union, as a condition of employment, a service fee equal to the amount of union dues. The Court ruled that service fees could be used to finance union expenditures for purposes of collective bargaining, contract administration and grievance procedures. However, they could not be used to support ideological causes:

> "We do not hold that a union cannot constitutionally spend funds for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative.. Rather, the Constitution requires that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment." Abood, supra, pp 235-236.

The Court noted that in determining an appropriate remedy, the "objective must be to devise a way of preventing compulsory subsidization of ideological activity" without restricting the union's ability to finance collective bargaining activities. The case was then remanded to the Michigan Court of Appeals, with a suggestion that further judicial action be deferred pending the voluntary use of a refund procedure developed by the parties during the course of the litigation.

Other decisions have focused upon the construction of the Federal Election Campaign Act of 1971 (FECA) and particularly what is now 2 USC §441b(b)(3)(A). In Pipefitters Local 562 v United States, 407 US 385; 92 S Ct 2247; 33 L Ed 2d 11 (1972), petitioners were convicted under 18 USC §610, which prohibited a labor organization from making a contribution or expenditure in connection with a federal election. After the Court had heard oral argument, section 610 was amended by adding the language contained in section 441b(b)(3)(A) of the FECA. This section now states:

> "(3) It shall be unlawful -
> (A) for such a fund to make a contribution or expenditure by utilizing money or anything of value secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, or financial reprisal; or by dues, fees, or other moneys required as a condition of membership in a labor organization or as a condition of employment, or by moneys obtained in any commercial transaction;"

The Supreme Court's decision in Pipefitters is explained by the District Court in Federal Election Commission v National Education Association, 457 F Supp 1102, 1105 (DDC, 1978):

> "Insofar as is pertinent here, the Court held that the Act merely codified existing law and further, that not all political contributions by labor organizations were prohibited, only those derived from funds that 'were actually or effectively required for employment or union membership.' Id. at 339, 439, 92 S.Ct. at 2256, 2276. The funds at issue in Pipefitters were raised by contributions and kept strictly segregated from the union's general treasury, which was financed by assessed dues. Id. at 414, 91 S.Ct. at 2264. The Court therefore concluded that reversible error had occurred because the jury was not instructed to determine whether the contributions to that segregated fund were voluntary or whether they were involuntary because required or effectively assessed. Id. at 420-21, 92 S.Ct. at 2274, 2275. To be voluntary the contribution must result from a 'knowing free-choice,' which means that the solicitation must be
>> conducted under circumstances plainly indicating donations are for political purposes and that those solicited may decline to contribute without loss of job, union membership, or other reprisal.
> Id. at 414, 92 S.Ct. at 2264. The purpose of such a standard, the Court said, is to protect the dissenting union member. Id. at 414-15, 92 S.Ct. at 2274."

The issue in FEC v NEA, supra, was whether a reverse check-off system used by the NEA and certain of its state affiliates, including MEA, to collect contributions to its separate segregated fund violated section 441b(b)(3)(A). Under that system, a person executing a membership application automatically agreed to the deduction of a $1.00 political contribution from his or her paycheck. The member had no opportunity to disallow the deduction in the first place but had to submit a separate, written refund request if the member did not wish to contribute to NEA-PAC.

After discussing Pipefitters, the Court cited with approval the decision reached in United States v Boyle, 157 US App DC 166; 482 F2d 755 (1973). In Boyle, the Court of Appeals considered a constitutional challenge to section 610 as amended by section 441b(b)(3)(A). Appellant argued that a union member's right not to contribute to a political cause could be protected less restrictively by permitting a refund "of a proportionate amount of a member's dues if the dissenter gives notice of his [or her] disagreement." The Court of Appeals rejected the refund alternative, indicating that Pipefitters required a union member to affirmatively approve a contribution "by assenting to have a deduction made from the member's paycheck." Boyle, supra, p 764.

The District Court concluded that "'knowing free-choice' means an act intentionally taken and not the result of inaction when confronted with an obstacle." FEC v NEA, supra, p 1109. Therefore, dissenting members could not be required to bear the burden of requesting a refund. In these circumstances, the Court ruled that "reverse check-off is per se violative of section 441b(b)(3)(A)'s prohibition against financing political funds by 'dues, fees, or other moneys required as a condition of membership in a labor organization.'" Id, p 1110. The Court did not rule out, however, a payroll deduction method which asked the union member beforehand if he or she wanted a contribution deducted along with his or her dues.

In so holding, the Court agreed with the Federal Election Commission (FEC), which had been asked prior to commencement of the litigation to render an advisory opinion concerning the federal act's application to variations of the reverse check-off procedure proposed by the NEA. The FEC had previously taken the position that reverse check-off violated section 441b(b)(3)(A). The NEA offered as an alternative a "premembership reimbursement method" under which the NEA would refund contributions to dissenting employees upon enrollment or at the beginning of each membership year, rather than at a later time. However, the employee's payroll deduction would continue throughout the year.

A majority of the Commission was unpersuaded:

> "The illegality of the reverse check-off procedure stems from the deduction of political monies from a member's paycheck even though he or she may not wish to contribute to the union's political fund. These funds are required as a condition of membership in that the political payment must be made in order to become a member or to maintain membership status in the union. The Act and the regulations prescribe that a refund of the political monies does not relieve the

> condition of membership proscription. The proposed premembership reimbursement method does not change the operation of a reverse check-off procedure, it merely alters the timing of the reimbursement. The reimbursement continues to operate as a refund in that there is a subsequent automatic payroll deduction of political funds and membership dues. The essence of the illegality of the reverse check-off procedure goes to how and why the funds are collected and not to the timing of the dissenting member's reimbursement." AO 1977-37. (April 14, 1978)

The system which the FEC and the District of Columbia Court found offensive required an automatic deduction from each member's paycheck. A member could not refuse to participate in the system and could not prevent the deduction of a political contribution from his or her salary. Thus, the member's only recourse was to seek a refund.

These factors were absent in Kentucky Educators Public Affairs Council v Kentucky Registry of Election Finance, 677 F2d 1125 (CA6, 1982), where the Court of Appeals approved a reverse check-off plan similar to the plan proposed by MEA. In this case, the Kentucky Education Association (KEA) was prohibited by state law from making contributions in candidate elections. KEA therefore established the Kentucky Educators Public Affairs Council (KEPAC) as a "separate political arm" to engage in election activity. Contributions to KEA and KEPAC were collected as follows:

> "Kentucky law authorizes local school systems to deduct KEA dues and other membership dues from salary checks. The deduction can be made only upon request of an employee or group of employees. This payroll deduction plan, called Automatic Payment Authorization, [hereinafter, 'APA'] has long been in use in Kentucky. Since 1975, KEPAC has used a 'reverse check-off' system in conjunction with KEA's payroll deduction of dues to obtain contributions. Under the reverse check-off system used by KEPAC, all KEA members executing APA forms have contributions, along with dues payments, insurance premiums, and retirement fund contributions, deducted from their salary checks unless the KEA member affirmatively checks off that she or he declines to contribute to KEPAC. The aims and activities of KEPAC are explained on the APA form. If a KEA member does not initially check off his or her designation to contribute to KEPAC, an automatic contribution is made. If the member does check off, and yet, subsequently decides not to participate, the member can stop the deduction and can also obtain a refund of past contributions. Separate forms are used for members who wish to contribute to KEPAC but not through the payroll deduction system." 677 F2d at 1127.

The Kentucky Corrupt Practices Act prohibited KEPAC from obtaining funds "by assessment or coercion." The issues before the Sixth Circuit, as described by the Court, were whether dissenting members were adequately protected by a reverse check-off procedure which allowed members to elect at the outset not to participate and which was coupled with a refund system, and whether contributions collected under this system were coerced or assessed.

The Kentucky District Court had previously determined that the reverse check-off plan used by KEPAC did not violate Kentucky law. In so holding, the Court distinguished FEC v NEA, supra, stating that the two cases involved different statutes. The Court of Appeals, agreeing with the lower court, further distinguished the cases:

> "....the fundamental questions in both cases was whether a reverse check-off system meets the 'Knowing Free-Service Donation' test set forth in Pipefitters. The District of Columbia Court held that a reverse check-off requiring a dissenter to submit a separate written request for refund rather than being able to disallow the deduction in the first place placed an undue burden on the dissenter. The Court below held that a reverse check-off procedure permitting a disallowance in the first place with a right of refund was not coercion and was not an assessment. The decisions are not incompatible, and the court below was correct in its analysis in its decision."

The Sixth Circuit held the rights of dissenting members were sufficiently protected because 1) they could leave KEA without jeopardizing their employment; 2) they could remain in KEA and attempt to influence its ideological positions; 3) they could check-off and refuse to contribute to KEPAC; or 4) they could request and receive refunds of KEPAC contributions. The Court also found no evidence indicating that contributions collected through reverse check-off were coerced or assessed.

The reverse check-off plan proposed by MEA is distinguishable from the NEA case in the same manner. Under MEA's revised proposal, new and existing members will be given the opportunity to check-off before any amount is deducted from their paychecks. If a member does not check-off or chooses to make a contribution, the member may still recover any amount transferred to MEA-PAC by requesting a refund. MEA-PAC will then return any money it has received from the member, plus any amount which will be deducted from the member's paycheck during the rest of that fiscal year. Although the member's payroll deduction will continue during that year, the deduction will not be for a political contribution but will be used to reimburse MEA-PAC. After a member requests a refund, the deduction will automatically be discontinued for subsequent fiscal years.

Moreover, you specifically state that service fee payers are not solicited, and their fees will not be increased under the proposed system. Thus, there is no danger that service fee payers will unknowingly or unwillingly subsidize MEA's political activities. Similarly, there is no suggestion that members will be coerced, threatened, or suffer job discrimination or financial reprisals if they refuse to contribute to MEA-PAC. Finally, by giving members notice and the opportunity to check-off beforehand, the proposal offers adequate measures which insure that members' contributions will be voluntary.

In these circumstances, MEA will not obtain contributions for MEA-PAC as a condition of employment or membership. A member may refuse to make a contribution to MEA-PAC either before or after money is deducted from his or her paycheck. If a member checks-off or requests a refund, money will no longer be deducted from the member's salary for the purpose of making a contribution to MEA-PAC. Thus, a person is not required to contribute to MEA-PAC in order to acquire or maintain membership in MEA, or employment in an MEA institution. Moreover, it does not appear that MEA members will be coerced, forced or threatened, nor will they suffer job discrimination or financial reprisals if they refuse to contribute to MEA-PAC. Therefore, the revised Guaranteed Contribution System proposed by MEA does not violate section 55 and is permitted under the Act.

It must be emphasized, however, that transfers to MEA-PAC must be made from earmarked contributions and not from MEA's membership dues or general treasury funds. Any transfer of MEA funds to MEA-PAC would result in a violation of section 54 of the Act.

This response is a declaratory ruling concerning the specific facts and questions presented.

Sincerely,

Richard H. Austin

MICHIGAN DEPARTMENT OF STATE

RICHARD H. AUSTIN • SECRETARY OF STATE

MUTUAL BUILDING
208 N. CAPITOL AVENUE

LANSING
MICHIGAN 48918

3-87-CD

November 16, 1987

Thomas H. Shields
Marketing Resource Group, Inc.
115 W. Allegan, Suite 910
Lansing, Michigan 48933

Dear Mr. Shields:

This is in response to your request for a declaratory ruling concerning the applicability of the Campaign Finance Act (the Act), 1976 PA 388, as amended, to a Corporate Executive Guaranteed Contribution System proposed by Marketing Resource Group, Inc. (MRG) for the collection of contributions to its separate segregated fund (MRG-PAC).

MRG-PAC was established by MRG pursuant to section 55 of the Act (MCL 169.255). This section states, in relevant part:

> "Sec. 55. (1) A corporation or joint stock company formed under the laws of this or another state or foreign country may make an expenditure for the establishment and administration and solicitation of contributions to a separate segregated fund to be used for political purposes. A fund established under this section shall be limited to making contributions to, and expenditures on behalf of, candidate committees, ballot question committees, political party committees, and independent committees.
>
> (2) Contributions for a fund established by a corporation or joint stock company under this section may be solicited from any of the following persons or their spouses:
>
> (a) Stockholders of the corporation.
>
> (b) Officers and directors of the corporation.
>
> (c) Employees of the corporation who have policy making, managerial, professional, supervisory, or administrative nonclerical responsibilities."

The proposed Corporate Executive Guaranteed Contribution System would apply only to "eligible employees," or those employees from whom contributions may be solicited under section 55(2)(c), and would operate as a "reverse check-off." Under the proposal, a contribution of $1.00 per month will automatically be deducted from each eligible employee's paycheck and remitted to MRG-PAC unless the employee indicates that he or she does not wish to make a contribution, or the

employee requests a refund.

To implement the system, new and existing eligible employees will be given MRG-PAC Continuing Contribution Authorization Forms. The form explains that a contribution will be withheld from the employee's paycheck "unless you check the box and sign the statement below. This contribution will be withheld unless this form is returned to the MRG payroll office within the next month or if at a later date you change your mind and request a refund." The form then describes how to obtain a refund, explains that a refund request will automatically operate to discontinue MRG-PAC contributions in future years, and discloses that contributions to MRG-PAC will be used to support candidates for elective office. Finally, the form states that 1) a contribution to MRG-PAC is voluntary and not a condition of employment, 2) an employee has the right to refuse to contribute to MRG-PAC, and 3) refusing to contribute will not alter the employee's status, rights or benefits with MRG. An employee may decline to participate in the system and prevent - at the outset - the deduction of political contributions by checking-off and returning the form within the allotted time.

The contribution system you describe appears to be identical, with one exception, to the reverse check-off plan recently implemented by the Michigan Education Association (MEA) and its separate segregated fund (MEA-PAC). In the attached declaratory ruling issued to Mr. Peter F. McNenly, dated August 4, 1987, the Department indicated that MEA's reverse check-off system was not prohibited by the Act. The only apparent difference between the MRG and MEA contribution systems is the relationship between the corporation and the individuals solicited.

Under the reverse check-off plan approved in McNenly, contributions to MEA-PAC are solicited only from members of MEA, a non-profit corporation which is restricted in the solicitation of contributions to its separate segregated fund by section 55(3). MRG-PAC, on the other hand, was established by a profit corporation and solicitations by MRG are regulated by section 55(2). Thus, the solicitation of contributions under the proposed Corporate Executive Guaranteed Contribution System will be limited to MRG employees who have policymaking, managerial, professional, supervisory, or administrative nonclerical responsibilities.

However, solicitations by non-profit and profit corporations are governed equally by section 55(4), which states:

> "Sec. 55. (4) Contributions shall not be obtained for a fund established under this section by use of coercion, physical force, or as a condition of employment or membership or by using or threatening to use job discrimination or financial reprisals."

The dispositive issue in the McNenly ruling was whether this subsection prohibited MEA from implementing its Guaranteed Contribution System. After thoroughly examining MEA's proposal and reviewing relevant decisions from other jurisdictions, the Department concluded that MEA's reverse check-off plan did not violate the Act, stating:

> "In these circumstances, MEA will not obtain contributions for MEA-PAC as a condition of employment or membership. A member may refuse to make a contribution to MEA-PAC either before or after money is deducted from his or her paycheck. If a member checks-off or requests a refund, money will no longer be deducted from the member's salary for the purpose of making a contribution to MEA-PAC. Thus, a person is not required to contribute to MEA-PAC in order to acquire or maintain membership in MEA, or employment in an MEA institution. Moreover, it does not appear that MEA members will be coerced, forced or threatened, nor will they suffer job discrimination or financial reprisals if they refuse to contribute to MEA-PAC. Therefore, the revised Guaranteed Contribution System proposed by MEA does not violate section 55 and is permitted under the Act."

This conclusion depended upon three key factors. First, new and existing MEA members may check-off and refuse to participate in the system before or after money is withheld from their paychecks. Second, if a member checks-off or requests a refund, no further political contributions are deducted from his or her paycheck. And third, at the time of MEA's ruling request, there was no evidence of coercion, force, threat, discrimination or financial reprisal if a member refused to contribute to MEA-PAC.

MRG's Corporate Executive Guaranteed Contribution System appears, on its face, to include similar safeguards. MRG proposes to give its eligible employees notice and the opportunity to refuse to participate in the system before contributions are withheld from their paychecks. An employee who does not check-off will be entitled to a refund upon submission of a timely written request. Political contributions will not be deducted from an employee's salary after the employee checks-off or requests a refund. Finally, MRG will advise its employees in notices printed on the contribution authorization form and in payroll stuffers that MRG-PAC contributions are voluntary and not a condition of employment, and that an employee's status, rights and benefits will not be altered if he or she elects not to make a MRG-PAC contribution.

If the above conditions are strictly adhered to, contributions to MRG-PAC will not be obtained as a condition of employment, and if the contributions are not obtained by the use of threat, force or coercion, the guaranteed contribution system is permissible under the Act. However, given the master-servant relationship which exists between MRG and its employees, extreme caution must be exercised to prevent MRG from exerting any coercion, express or implied, upon its solicited employees. For example, if MRG-PAC contributions are solicited outside of normal channels or in circumstances which suggest that an employee does not have a free choice, a violation of the Act may occur. This determination can only be made on a case by case basis.

Finally, it should be noted that this ruling is limited to the application of the Campaign Finance Act to MRG's proposed contribution system. The Wages and Fringe Benefits Act, 1978 PA 390, as amended, may prohibit MRG from implementing a reverse check-off plan. Specifically, section 7 of that act (MCL 408.477) provides:

"Sec. 7. With the exception of those deductions required or expressly permitted by law or by a collective bargaining agreement, an employer shall not deduct from the wages of an employee, directly or indirectly, any amount without the full, free, and written consent of the employee, obtained without intimidation or fear of discharge or refusal to permit the deduction. A deduction for the benefit of the employer shall require written consent from the employee for each wage payment subject to the deduction and the cumulative amount of the deductions shall not reduce the gross wages paid to a rate less than minimum rate as defined in Act No. 154 of the Public Acts of 1964, as amended, being sections 408.381 to 408.397 of the Michigan Compiled Laws. Each deduction shall be substantiated in the records of the employer and shall be identified as pertaining to an individual employee. Prorating of deductions between 2 or more employees shall not be permitted." (emphasis added)

Questions concerning the applicability of this statute to MRG's Corporate Executive Guaranteed Contribution System should be referred to the Department of Labor, Bureau of Employment Standards, 7150 Harris Drive, Box 30015, Lansing, Michigan 48909.

This response is a declaratory ruling concerning the applicability of the Campaign Finance Act to the specific facts and questions presented.

Sincerely,

Richard H. Austin